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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 199

MARY JO WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF PERCY L. WILLIAMS AND MARY JO WILLIAMS, TRANSFEREE OF THE ASSETS OF PERCY L. WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. 5a–9a) are reported at 164 F. Supp. 874. The opinion of the court of appeals (Pet. 3a–5a) is reported at 264 F. 2d 227.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1959. A timely petition for rehearing was denied on April 10, 1959. The petition for a writ of certiorari was filed on July 9, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory notice of deficiency issued by the Commissioner was sent to the last known address of the deceased within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939.

2. Whether this action was barred because of the alleged failure to comply with Ohio statutes of limitation.

3. Whether the district court lacked jurisdiction through absence of statutory authorization for the action brought by the United States against the administratrix of the deceased taxpayer.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 272 and 312 of the Internal Revenue Code of 1939, and Treasury Regulations 111, Section 29.312–1, are set forth in the Appendix, *infra*, pp. 14–17.

STATEMENT

During the years 1944, 1945, and 1946, Percy L. Williams resided in Cincinnati, Ohio, and derived income from various sources in that vicinity, including the operation of a lottery and numbers business (R. 22–23).[1]

On July 28, 1954, Percy L. Williams filed with the District Director of Internal Revenue of Ohio a power

[1] "R." refers to the appendix to the taxpayer's brief in the court of appeals; "Supp. R." refers to the appendix to the brief for the United States in the court of appeals.

of attorney with respect to all matters involving his federal taxes, particularly for the years 1944, 1945, 1946, and 1948. This power of attorney authorized and requested that all communications relative to Williams' tax matters be mailed to Mr. Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio. Percy L. Williams died on November 3, 1955 (R. 37–38).

In 1953 an investigation was conducted by the Internal Revenue Service into the income-tax liabilities of Percy L. Williams for the taxable years 1944, 1945, and 1946. This investigation was concluded late in 1955. Computations of internal revenue agents, based on the ascertainable net worth of Percy L. Williams, revealed that he had understated his net income on his returns for the three taxable years in the following amounts (Exs. 1-D, 2; Supp. R. 5, 1b-11b):

	1944	1945	1946	Total
Net income disclosed on return	$2,708.26	$15,329.33	($15,808.15)	$2,229.44
Net income as corrected	27,091.43	20,262.58	6,832.72	54,186.73
Adjustment to income	24,383.17	4,933.25	22,640.87	51,957.29

On December 2, 1955, the Commissioner of Internal Revenue issued a statutory notice of deficiency (90-day letter) to Percy L. Williams asserting a deficiency of income taxes, plus penalties and interest, for the taxable years 1944, 1945, and 1946 as follows (Ex. 1-D, Supp. R. 1b–11b):

Kind of assessment	1944	1945	1946
Income tax	$9,806.09	$2,603.88	$1,250.68
Interest	6,496.19	1,508.75	678.45
293(b) fraud penalty	5,593.38	1,301.94	625.34
294(d) penalty	423.60	187.25	

The statutory notice of deficiency was sent by registered mail to Mr. Percy L. Williams, c/o Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio. (R. 38–39). On December 7, 1955, the District Director of Internal Revenue at Cincinnati received back the notice of deficiency from Goodman as well as notification that Goodman's power of attorney had been revoked by the death of Goodman (Ex. 1–G; Pet. 4). The District Director returned the notice of Goodman on the following day (Ex. 1–H; Pet. 4).

Prior to the issuance of the statutory notice of deficiency there had never been filed with the Commissioner of Internal Revenue or the District Director of Internal Revenue for Ohio any notice of fiduciary relationship on behalf of Mary Jo Williams (R. 38). On December 21, 1955, Mary J. Williams was appointed administratrix of the estate of Percy L. Williams.

On March 30, 1956, the Commissioner of Internal Revenue made a deficiency assessment of income taxes, penalties, and interest against Percy L. Williams for the same years and in the same amounts as was set out and asserted in the statutory notice of deficiency sent on December 2, 1955. On April 2, 1956, notice was given and demand made for the payment of the taxes, penalties, and interest as assessed on March 30, 1956. Notice of a tax lien in the sum of $30,535.56, representing the taxes, penalties, and interest as assessed against Percy L. Williams on March 30, 1956, was filed with the Recorder of Hamilton County, Cincinnati, Ohio, on April 23, 1956. No

part of the assessment made against Percy L. Williams on March 30, 1956, has been paid (R. 38, 39).

On August 17, 1956, the Acting District Director of Internal Revenue of Ohio filed with Mary Jo Williams, the administratrix of the estate of Percy L. Williams, a statement of claim for taxes as assessed on March 30, 1956, in the total amount of $30,535.56. On September 14, 1956, Mary Jo Williams, as administratrix of the estate, acknowledged that the claim was filed and gave notice that the claim was rejected and disallowed. No part of the claim filed with Mary Jo Williams has been paid. At the time of his death, Percy L. Williams was the owner of real property and improvements, personal property, and certain contract rights (R. 39–40).

A complaint was filed on November 9, 1956, by the United States against Mary Jo Williams, as administratrix of the estate of Percy L. Williams, to have its lien for unpaid taxes impressed upon any remaining assets in the estate and to have the lien foreclosed; and for a judgment against Mary Jo Williams, as administratrix and distributee, for the amount of the deficiency, plus penalties and interest (R. 22–29). On December 21, 1956, the taxpayer filed an answer and cross-complaint asking for an order enjoining the United States from proceeding with the action. (R. 30–33).

The district court found that the deficiencies in income taxes asserted and assessed against Percy L. Williams on March 30, 1956, were due to fraud with intent to evade the tax, and it held (1) that the

statutory notice of deficiency was sent to the last known address of Percy L. Williams within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939; (2) that the taxpayer as administratrix is indebted to the United States until the deficiency, plus penalties and interest from date of the assessment, are paid; (3) that the United States has a lien for unpaid taxes on all property, real and personal, still in the control of the taxpayer either as administratrix or as distributee; (4) that the United States has a lien against assets in the estate, including fifty-one shares of stock of Playbowl, Inc., held by F. D. Henry as trustee for Percy L. Williams, and the sum of $4,870.46 due from Mrs. Ruth Leviteh under a contract (R. 39–41).

The district court dismissed the taxpayer's cross-complaint and ordered that the real and personal property in taxpayer's control as administratrix or distributee, as well as fifty-one shares of Playbowl, Inc., be sold and the proceeds used to satisfy or apply on the lien of the United States; that the amount due from Mrs. Levitch be paid to the United States to apply on its lien; and that the United States have a deficiency judgment against the taxpayer as administratrix in the amount of any assessment remaining unsatisfied after the foreclosure or payments (R. 42–43). The court of appeals affirmed (Pet. 3a–5a).

ARGUMENT

1. The taxpayer here contends (Pet. 8–12), as she did in the district court and in the court of appeals, that the notice of deficiency was not sent as required

by statute,[2] to the deceased's last known address. She specifically contends (Pet. 8–9) that, since the instruction in the power of attorney was to send all communications to Sol Goodman, and not to Williams in the care of Sol Goodman, the latter's address was not Williams' last known address. However, whether the statutory notice of deficiency issued by the Commissioner and sent by registered mail on December 2, 1955, was sent to the last known address of the deceased within the meaning of Section 272 (a) and (k) of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 14–15, presents a factual question of no general importance. Moreover, this issue has been decided adversely to the taxpayer by both courts below, on evidence which fully supports the result.

By the power of attorney executed on July 27, 1954 (Ex. 1–E, Supp. R. 12b–13b), Williams not only appointed Sol Goodman to act for him in connection with any matters involving federal taxes, particularly for the years 1944, 1945, 1946, and 1948, but he also requested that all communications be sent to Sol Goodman, 1016 Union Trust Building, Cincinnati, Ohio. In accordance with that request, the Commissioner's notice of deficiency for the taxes involved was sent to Williams in care of Sol Goodman at 1016 Union Trust

[2] Although taxpayer cites and relies on Section 6212 of the 1954 Code (Pet. 8, 12, 13), that section applies only to taxes imposed by the 1954 Code for taxable years beginning after December 31, 1954 (see Section 7851(a)(1)(A) and (a)(6) of the 1954 Code). The corresponding section of the 1939 Code is Section 272 (a)(1) and (k), which is applicable to the taxable years 1944 to 1946 here involved. The provisions of Section 272 of the 1939 Code and Section 6212 of the 1954 Code are substantially the same.

Building, Cincinnati, Ohio (Ex. 1-D, Supp. R. 1b–2b). The fact that Williams' own name was added to the notice of deficiency served only to particularize the notice, and complied with Section 272(k) of the Internal Revenue Code of 1939, which requires that the notice be sent "to the taxpayer" at his last known address.

Under the terms of Section 272(k), notice of a deficiency is sufficient if mailed to the last known address of the taxpayer "even if such taxpayer is deceased." At the time the notice was sent, before Goodman returned it to the District Director, the Goodman address was the last address of petitioner known to the Commissioner. Moreover, while the death of Williams revoked the power of attorney, it "did not erase the taxpayer's request therein to the Director that 'all communications and other matters be mailed' to the taxpayer at the attorney's address" (Pet. 4a).[3]

The decisions below are not contrary to the decision of *D'Andria* v. *Commissioner*, 263 F. 2d 904 (C.A.D.C.), as alleged by the taxpayer (Pet. 6, 10–11). The *D'Andria* case involved a situation where a deficiency notice was sent by registered mail to the taxpayer at an address which was not the last known address in the files of the Commissioner, and the copy

[3] The taxpayer was not entitled to have a notice of deficiency sent to her since she was not appointed administratrix until after the notice of deficiency had been issued, and thus had not filed a notice of fiduciary relationship with the Commissioner under Section 312 of the 1939 Code, Appendix, *infra*, p. 15. See also Treasury Regulations 111, Sec. 29.312-1, Appendix, *infra*, pp. 15–17.

of the notice sent to the taxpayer's attorney was sent by ordinary mail. Thus neither the original nor the copy was mailed in accordance with the statutory requirements. In the instant case, the deficiency notice was sent by registered mail to the deceased taxpayer at his last known address. Since he had not notified the Commissioner of any subsequent change of address prior to his death on November 3, 1955, the address of Sol Goodman was the latest address ascertainable by the Commissioner from his files, and the notice of deficiency sent there fully complied with the statutory requirement. *Commissioner* v. *Stewart*, 186 F. 2d 239 (C.A. 6); *Clark's Estate* v. *Commissioner*, 173 F. 2d 13 (C.A. 2); *Welch* v. *Schweitzer*, 106 F. 2d 885 (C.A. 9); *Dilks* v. *Blair*, 23 F. 2d 831 (C.A. 7); *Gregory* v. *United States*, 57 F. Supp. 962 (C. Cls.), certiorari denied, 326 U.S. 747; *United States* v. *Lyman*, 36 F. Supp. 53 (D. Mass.), modified on other grounds, 125 F. 2d 67 (C.A. 1); *Trefry* v. *Commissioner*, 10 B.T.A. 134.*

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*Taxpayer's contention (Pet. 9-10) that she was deprived of her right to contest the deficiency in the Tax Court is not borne out by the record. The 90-day notice was mailed December 2, 1955. She was appointed administratrix on December 21, 1955. When the deficiency notice addressed to Williams in Goodman's care reached Goodman, he returned it to the District Director. After the deficiency notice was remailed to Goodman by the Director on December 8, 1955, Goodman sent it to Mr. Theodore Berry. Both Goodman and Berry appeared for the taxpayer in the courts below.

Taxpayer also suggests (Pet. 6, 11) that she was unable to pay the tax and sue for a refund in the tax court. Since, however, she has not filed an accounting (Supp. R. 18b) or otherwise shown the assets of the estate, the administrative expenses, or the distributions, it is impossible to ascertain from the record whether her claim is factually correct.

2. There is no merit to taxpayer's contention (Pet. 12) that the failure of the United States to file a claim with the administratrix within four months of her appointment, as required by Ohio law, barred this action. The Government has no duty to appear as a creditor in the state courts. *Field* v. *United States*, 9 Pet. 182, 200; *Viles* v. *Commissioner*, 233 F. 2d 376, 380 (C.A. 6); *United States* v. *Fisher*, 57 F. Supp. 410 (E.D. Mich.). Similarly, the United States is not bound by state statutes of limitation. *Phillips* v. *Commissioner*, 283 U.S. 589; *United States* v. *Summerlin*, 310 U.S. 414; *Taylor* v. *United States*, 324 Mass. 639, 88 N.E. 2d 121, certiorari denied, 338 U.S. 948. Therefore, the claim filed by the United States was not untimely.

After the United States filed its claim with the administratrix on August 17, 1956, and she had rejected it on September 14, 1956 (R. 39), this action was brought on November 7, 1956, or within the two months (R. 21) allowed by Ohio Rev. Code, Sec. 2117.12, to commence an action on such a rejected claim. Moreover, since actions under Section 2117.12 must be brought "in a court of general jurisdiction," rather than the probate courts (*In re Estate of Smith*, 67 Ohio L. Ab. 409, 412, 120 N.E. 2d 632; *In re Estate of Buchanan*, 82 Ohio App. 240, 81 N.E. 2d 409), the United States could properly bring this

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In *Rice* v. *Sayers*, 198 F. 2d 724 (C.A. 10), and *Nelson* v. *Miller*, 201 F. 2d 277 (C.A. 9), on which the taxpayer relies (Pet. 12), the United States was not a party. *Commissioner* v. *Stern*, 357 U.S. 39, involved the substantive liability of a beneficiary of a life insurance policy in transferee proceedings, and has no bearing on the issues here involved.

action in the federal district court. And, even if Ohio law had attempted to grant exclusive jurisdiction to the Ohio courts (see Ohio Rev. Code 2102.24), a federal district court could not be deprived of concurrent jurisdiction to decide the validity and amount of a federal tax claim. *United States* v. *Peoples Trust & Savings Co.*, 97 F. 2d 771 (C.A. 7). Thus, the United States, whether or not required to do so, complied with Ohio requirements with respect to bringing suit against an administratrix on a rejected claim.

3. The taxpayer attempts (Pet. 12-13) to attack the jurisdiction of the district court on the ground that there was no statutory authority for the action.[6] The jurisdiction of the district court rested on 28 U.S.C. 1345 and 1396, which together provide that "[a]ny civil action for the collection of internal revenue taxes may be brought" in the district courts. Under these provisions, the United States may sue a decedent's personal representative in a district court to recover a judgment for income taxes for years prior to the decedent taxpayer's death. *United States* v. *Peoples Trust & Savings Co., supra.* See also *United States* v. *E. Regensburg & Sons*, 124 F. Supp. 687 (S.D.N.Y.), affirmed, 221 F. 2d 336 (C.A. 2), certiorari denied, 350 U.S. 842. This suit against the taxpayer individually is brought to recover her liability as decedent's transferee or distributee; and, con-

[6] The taxpayer also suggests (Pet. 6, 13) that she was denied the opportunity to litigate the merits of the taxes. She could, however, have raised defenses to the merits of this action, if any valid defense existed, without in any way waiving her jurisdictional arguments. See Rule 12(b), F.R. Civ. P.

trary to her contention (Pet. 13), the United States may bring an action against a transferee under the trust fund doctrine, without notice or assessment. See *Phillips* v. *Commissioner*, 283 U.S. 589; *Viles* v. *Commissioner*, 233 F. 2d 376, 380 (C.A. 6). The action here is therefore valid as one brought in personam against the administratrix, whose liability rests on the fact that she is both the personal representative and a transferee or distributee of the deceased taxpayer.[7]

[7] We are not unmindful of the fact that a federal district court may not interfere with the administration of property in the custody of a state probate court. *Pufahl* v. *Estate of Parks*, 299 U.S. 217; *Penn Co.* v. *Pennsylvania*, 294 U.S. 189; *United States* v. *Peoples Trust & Savings Co.*, *supra*; *Hart* v. *United States*, 207 F. 2d 813 (C.A. 8). In Ohio, however, under the law prior to amendment of its Code (in 1938, 1953, and 1957; see Ohio Rev. Code, Secs. 2101, 2109 and 2117), it was clear that the probate courts did not have jurisdiction to distribute or to determine the merits of rejected claims against the estate. *Brown* v. *Routzahn*, 58 F. 2d 329, 333 (N.D. Ohio), reversed on other grounds, 63 F. 2d 914 (C.A. 6), certiorari denied, 290 U.S. 641; see *Collins* v. *Williamson*, 229 Fed. 59, 64–65 (C.A. 6). Even now, after those amendments, it is not entirely clear that the Ohio statute gives its probate courts sufficient jurisdiction over an estate to bar judgments in other courts regarding the disposition of its property. Cf. *United States* v. *Saxe*, 261 F. 2d 316 (C.A. 1) (a foreclosure action), with *United States* v. *First National Bank*, 54 F. Supp. 351 (N.D. Ohio). The taxpayer has not urged here or in the courts below that the Ohio probate courts now have such jurisdiction and, absent some showing, no such change can be presumed. Cf. *Helvering* v. *Fitch*, 309 U.S. 149, 155–156.

In addition, no accounting has been filed in the state probate court, and, indeed, the last paper there filed was the approval of the inventory. In such circumstances it has been and is impossible to determine what property of decedent has ever come under the control of the administratrix. Nor has it been possible to determine what part if any of decedent's estate has

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
ABBOTT M. SELLERS,
Acting Assistant Attorney General.
A. F. PRESCOTT,
CAROLYN R. JUST,
Attorneys.

SEPTEMBER 1959.

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been distributed. Hence, it cannot be ascertained at this time what implementing orders, if any, must be obtained from the probate court before the Government's lien can be satisfied.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272 [as amended by Sec. 203, Act of December 29, 1945, c. 652, 59 Stat. 669].

PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of

the joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(k) *Address for Notice of Deficiency.*—In the absence of notice to the Commissioner under section 312(a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(26 U.S.C. 1952 ed., Sec. 272)

SEC. 312. NOTICE OF FIDUCIARY RELATIONSHIP.

(a) *Fiduciary of Taxpayer.*—Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this chapter (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

* * * * *

(c) *Manner of Notice.*—Notice under subsection (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(26 U.S.C. 1952 ed., Sec. 312)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.312-1. *Fiduciaries.*—As soon as the Commissioner receives notice that a person is acting in a fiduciary capacity, such fiduciary must, except as otherwise specifically provided, assume the powers, rights, duties, and privileges of the taxpayer with respect to income tax imposed by chapter 1. * * * The "notice

to the Commissioner" provided for in section 312 shall be a written notice signed by the fiduciary and filed with the Commissioner. The notice must state the name and address of the person for whom the fiduciary is acting, and the nature of the liability of such person; that is, whether it is a liability for tax, and, if so, the year or years involved, or a liability at law or in equity of a transferee of property of a taxpayer, or a liability of a fiduciary under section 3467 of the Revised Statutes, as amended (paragraph 81 of the Appendix to these regulations), in respect of the payment of any tax from the estate of the taxpayer. * * * Unless there is already on file with the Commissioner satisfactory evidence of the authority of the fiduciary to act for such person in a fiduciary capacity, such evidence must be filed with and made a part of the notice. If the fiduciary capacity exists by order of court, a certified copy of the order may be regarded as such satisfactory evidence. * * *

If the notice of the fiduciary capacity described in the preceding paragraph is not filed with the Commissioner prior to the sending of notice of deficiency by registered mail to the last known address of the taxpayer (see section 272(a)), or the last known address of the transferee or other person subject to liability (see section 311), no notice of the deficiency will be sent to the fiduciary. In such a case the sending of the notice to the last known address of the taxpayer, transferee, or other person, as the case may be, will be a sufficient compliance with the requirements of the Internal Revenue Code, even though such taxpayer, transferee, or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. Under such circumstances if no petition is filed with The Tax Court of the United States within 90 days after the mailing of the notice (or within 150 days after

mailing in the case of such a notice mailed after October 21, 1942, and addressed to a person outside the States of the Union and the District of Columbia) to the taxpayer, transferee, or other person, the tax, or liability under section 311, will be assessed immediately upon the expiration of such 90-day or 150-day period, and demand for payment will be made by the collector. The term "fiduciary" is defined in section 3797(a)(6) to mean a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

U.S. GOVERNMENT PRINTING OFFICE: 1939